The Determination of Jurisdiction in Cross-border Business-to-Consumer Transactions : A Consultation Paper

Overview of the Project

At the November 1999 Conference of Federal, Provincial and Territorial Ministers Responsible for Consumer Affairs, the Consumer Measures Committee (CMC), in the context of proposing to harmonize and adapt consumer law to electronic commerce, committed to

> ....study the issues of applicable law and competent forum in the event of disputes between buyers and sellers in different jurisdictions within the context of international developments and report back at the next ministerial meeting.

In May 2001, the Federal, Provincial and Territorial Ministers endorsed the Internet Sales Contract Harmonization Template[1] and announced their intention to implement it within their respective jurisdictions. Ministers agreed, however, that there was a need for further discussion of the particularly difficult issues of applicable law and forum in the resolution of cross-border disputes in electronic commerce.

The Ministers asked CMC to develop options addressing jurisdictional issues in cross-border electronic commerce contracts, to protect consumers and allow businesses to operate efficiently.

The following papers were presented at a CMC workshop in April 2001 and were tabled at the Uniform Law Conference of Canada (ULCC) in August 2001:

- A paper on the determination of jurisdiction as it applies to contractual and private law rights in business to consumer online transactions by Professor Michael Geist, arranged by the CMC in conjunction with the ULCC; [2] and

- A paper on the determination of jurisdiction as it applies to regulatory or public law by the law firm Gowling Lafleur, Henderson LLP arranged by the CMC. [3]

The ULCC establisheda working group to examine legislative options for addressing Internet jurisdictional issues and to work with the CMC in addressing these issues in relation to consumer matters.

In November 2001, a joint working group comprised of members of the CMC and ULCC (the "Joint Working Group") was established to consider policy options and to develop a draft proposal for jurisdictional rules regarding consumer matters.

CMC Consultation process

The paper below sets out a draft proposal regarding jurisdictional rules for cross-border business-to-consumer transactions. All interested parties are invited to comment on the draft proposal and any related issues.

The CMC will take into account the results of this consultation when preparing a final proposal.

Interested parties are asked to send their comments in writing no later than September 6, 2002 to the following address:

Consumer Measures Committee
c/o Mr. David Clarke
Office of Consumer Affairs
Industry Canada
Room 911 A, C.D. Howe Bldg.
235 Queen Street
Ottawa, Ontario
K1A 0H5
Phone (613) 957-8717
Fax (613) 952-6927
E-mail : clarke.david@ic.gc.ca

Any personal information provided is subject to federal, provincial and territorial privacy laws. The information will be used to assist us in conducting and evaluating the results of the consultation, which may involve disclosing your comments to other interested parties during and after consultation. Please note that, individuals' names and other identifying information will not be disclosed to the public without their consent.

Consultation Paper

Introduction:

Electronic commerce, or the buying and selling of goods and services online, is changing the marketplace. Although estimates of electronic commerce vary considerably, growth has been exponential.[4] With cross-border transactions increasing, it is important that the legal framework supporting commercial transactions on the Internet be governed by consistent principles that lead to predictable results regardless of the jurisdiction in which a particular buyer or seller resides.

Whenever a dispute crosses over borders, involving more than one territory, questions arise concerning which court has jurisdiction to hear the dispute (choice of forum) and which territory's laws govern the resolution of the dispute (choice of law).

Although commercial transactions, whether carried out electronically or otherwise, are subject to traditional rules relating to jurisdiction, traditional rules have been based on territorial principles.

Electronic commerce is breaking down the concept of necessarily having a physical presence in a territory to provide goods or services to consumers in that territory. The Internet greatly diminishes or eliminates the need for physical contact between the parties. Goods and services are being provided across jurisdictional lines.

The Need for a New Approach

Electronic commerce has the potential to bring benefits to both consumers and businesses. However, without a sound legal framework, consumers will have less confidence in shopping on the Internet and the Internet will not develop to its potential. Trust and confidence are important to the growth of electronic commerce. There is a need for both consumers and businesses to have legal certainty regarding jurisdictional rules for Internet transactions.

The choice of forum and choice of law have practical consequences for consumers and businesses doing business on the Internet. If a consumer receives defective goods, the consumer needs to know where to sue the supplier and which law will govern his or her right of action. Vendors, on the other hand, want to know in which jurisdictions they may be subject to court proceedings and which consumer protection laws they must comply with.

Electronic commerce involves all the risks and benefits of traditional commerce complicated by the use of computer and communications technology. Uncertainty is an impediment to economic activity. Given the unique challenges that are presented by transactions that take place over the Internet, it is important to consider as a matter of policy whether the traditional jurisdictional rules should be used or adapted for Internet disputes.

Traditional Jurisdictional Rules under Canadian Law

1. Choice of Forum

In Canada, jurisdiction depends upon the existence of defined connections between:

a) the territory or legal system of a jurisdiction; and
b) a party to the proceeding or the facts on which the proceeding is based.[5]

Traditional principles involve considering, firstly, on what basis a court has jurisdiction and secondly, the circumstances in which a court may decline to exercise its jurisdiction on the basis that it would be more appropriate for another jurisdiction to hear a case.

Jurisdiction to hear a dispute

Civil Law
In the province of Québec, the *Civil Code of Québec* sets out rules governing whether a court has jurisdiction to hear a case.

Article 3148 of the *Civil Code of Québec* reads as follows:

> 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
>
> (1) the defendant has his domicile or his residence in Québec;
> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Quebec, and the dispute relates to its activities in Québec;
> (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
> (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
> (5) the defendant submits to its jurisdiction.
>
> However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

Article 3149 of the *Civil Code of Québec* reads as follows:

> 3149. A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

Common law

Although the grounds for determining if a court has jurisdiction to hear a dispute currently differ from province to province, courts regularly assert jurisdiction outside their territory.[6] In general, courts in the common law jurisdictions have jurisdiction in a proceeding that is brought against a person if:

- the person submits to the court's jurisdiction during the course of the proceeding;
- the person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim;
- there is an agreement between the plaintiff and the defendant to the effect that the court has jurisdiction in the proceeding;
- the person is ordinarily resident in the province or territory at the time of the commencement of the proceedings; or
- there is a real and substantial connection between the province or territory and the facts on which the proceeding against that person is based.

Real and substantial connection

For a court to have jurisdiction over a person who is not ordinarily resident in its territory and does not consent to the court's jurisdiction, a real and substantial connection must exist.[7] The Supreme Court of Canada has held that there are constitutional limits to the exercise of jurisdiction against persons outside the province.[8]

The real and substantial connection requirement is essentially designed to provide a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.

In determining whether or not an action concerning contractual obligations has a real and substantial connection to a jurisdiction, courts have traditionally considered factors such as: the respective residences of the parties, the place where the contract was signed or where the contractual obligations were to be performed, whether the defendant conducted business or had other dealings in the province and other similar connecting factors.[9] The traditional indication of carrying on business in a particular geographic territory is often tested by examining physical connections to the jurisdiction.[10]

Choice of Jurisdiction Clauses

While forum selection clauses are generally treated with a measure of deference by Canadian courts, the mere existence of a jurisdictional clause, particularly when a consumer contract is involved is not determinative of the issue.[11] Courts are not bound to give effect to an exclusive jurisdiction clause if there is a reason to override the agreement.[12]

Factors that courts have considered in determining whether they should refuse to enforce forum selection clauses in agreements include: whether the agreement was unreasonable because the clause in question was not negotiated at arm's length, how the assent to the

contract was obtained, whether the court perceives the party is seeking to contract out of the jurisdiction with the closest connection to the parties and whether the law of the foreign country applies and its differences from the domestic law in any respect.[13]

It should be noted that consumer legislation in some jurisdictions provide that a consumer may not waive his or her rights, including the consumer's right to bring proceedings in his or her home jurisdiction.

Forum non conveniens

However, notwithstanding that a court concludes that it has jurisdiction to hear a dispute, the court is not obliged to assume jurisdiction. Under the doctrine of *forum non conveniens*, a court may decline to exercise its jurisdiction on the basis that another jurisdiction would be more appropriate to hear the dispute. Although all Canadian provinces and territories recognize the principle of *forum non conveniens*, the rules respecting doctrine's application are not elaborated in any detail in governing legislation.[14]

Article 3135 of the Quebec *Civil Code*, for example, simply provides that a court may decline jurisdiction "if it considers that the authorities of another country are in a better position to decide."

In deciding the question of whether it or a court in another jurisdiction is the more appropriate forum in which to hear a proceeding, the court must consider factors such as:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
(b) the law to be applied to issues in the proceeding;
(c) the desirability of avoiding multiplicity of legal proceedings;
(d) the desirability of avoiding conflicting decisions in different courts;
(e) the enforcement of an eventual judgment; and
(f) the fair and efficient working of the Canadian legal system as a whole.[15]

Internet Disputes

In cases where Internet activities are involved, the traditional factors for determining whether or not an action has a real and substantial connection to a jurisdiction are less than satisfactory. Courts have noted that modern business transactions are increasingly being conducted so that the parties do not have to leave their respective places of business to conclude contracts and carry out many business and service functions. It is recognized that this can make it difficult to determine whether an action has a real and substantial connection to a jurisdiction.[16]

Courts have applied various tests to determine whether they have jurisdiction over Internet disputes. Some courts have simply applied traditional rules, while others have tried to develop new tests to accommodate the uniqueness of the electronic commerce.[17]

As a result, it is difficult to find consistency in the application of rules to determine whether a particular court has jurisdiction over an Internet dispute. For example, courts have reached differing, and in some cases inconsistent, conclusions as to the level of interactivity that must be found to exist before a court will conclude that the defendant has a sufficient connection with the jurisdiction. Many commentators have concluded that the current case law is "inconsistent, irrational and irreconcilable".[18]

Given the unique jurisdictional issues created by the Internet, concerns have been expressed that relying upon these traditional rules to determine jurisdiction is problematic for electronic commerce.[19]

2. Choice of Law

The determination of which province or territory's laws will be applied to a contractual dispute can also be very important. As legal provisions for consumer protection vary between provinces and territories,[20] applicable law can mean the difference between a breach and no breach of the law.

Civil Law
Book Ten of the *Civil Code of Quebec* sets out rules governing conflicts of laws. In the case of a consumer contract, article 3117 reads as follows:

> **3117.** The choice by the parties of the law applicable to a consumer contract does not result in depriving the consumer of the protection to which he is entitled under the manda tory provisions of the law of the country where he has his residence if the formation of the contract was preceded by a special offer or an advertisement in that country and the consumer took all the necessary steps for the formation of the contract in that country or if the order was received from the consumer in that country.
>
> The same rule also applies where the consumer was induced by the other contracting party to travel to a foreign country for the purpose of forming the contract.
>
> If no law is designated by the parties, the law of the place where the consumer has his residence is, in the same circumstances, applicable to the consumer contract.

Common Law
In the absence of an express choice of law by the parties, the courts have generally held that the proper law of the contract is the law of the jurisdiction in which the transaction has its closest and most real connection.[21] While parties are generally free to choose any law as the governing law of the contract, an express choice of law made in contravention of a statute will not be recognized. In addition, the courts have also held that parties

should not be allowed to evade mandatory provisions of the law of the jurisdiction with which the transaction has its closest and most real connection.[22]

In determining the jurisdiction that has the most real and substantial connection with the transaction, the court has traditionally considered factors such as the place of contracting, the place of performance, the legal terminology in which the contract is drafted, the currency in which they payment is to be made, the nature and location of the subject matter of the contract, the residence of the parties or the head office of a corporation party to the contract.

The issue of choice of law also raises considerable controversy in the context of consumer transactions over the Internet. Determining when and where an electronic contract is formed and the law governing it can raise many complex issues. Online sellers need to know which laws they need to comply with and what consumer protections apply to the sale of their products and services. Consumers also need to have a clear understanding of which jurisdiction's laws will apply to online transactions.

3. Conclusion

The current Canadian framework results in legal uncertainty for consumers and businesses alike as to what which court has jurisdiction to hear the dispute and which province or territory's laws should govern the resolution of a dispute.

International Developments

Given the global nature of electronic commerce, jurisdictional rules are not only a concern at the national level. While international jurisdictional issues existed prior to the emergence of electronic commerce, the borderless nature of Internet and its dramatic growth have raised the importance of jurisdictional issues to a much higher level.

In recent years, a number of international initiatives have been undertaken to review potential jurisdictional conflicts and their resolution.[23] These initiatives underscore the novelty and complexity of the policy and technical issues surrounding electronic commerce and in determining internationally acceptable rules for jurisdiction.

Approaches considered

Although there is widespread support in principle that what electronic commerce needs is certainty and predictability, there is a general lack of consensus regarding which approach should be adopted.[24]

The subject has generated worldwide interest and ongoing debate. For a more detailed review of some of the international and national initiatives, please see attached Appendix I. In general, these initiatives have considered the following approaches to address Internet jurisdictional issues in relation to consumer contracts:

1. **Country-of-Destination Approach (or Rule of Destination Approach)**

   One approach is to allow consumers to always sue in their home jurisdiction and to allow consumers to rely on the protection of their own laws. Under this approach, jurisdiction is only exercisable by the courts of the territory in which the goods or services are received.

   Consumer advocates promote this approach as the best way to ensure that consumers have effective protection and access to redress.[25]

   Businesses, on the other hand, have expressed concern that under this approach they would be forced to defend themselves against actions in a multitude of jurisdictions with no ability to narrow the scope of such expansive jurisdictional claims.[26]

2. **Country-of-Origin Approach (or Rule of Origin Approach)**

   Another approach is to allow jurisdiction to always rest with the seller. This rule would subject businesses only to the laws and courts of their own country. Jurisdiction is only exercisable by the courts in which the source of the transaction is located;

   This approach addresses key concerns of businesses, most notably the need for a predictable legal environment and reduced compliance costs.[27]

   However, this approach raises serious concerns from the consumer perspective. Consumer groups argue that adopting a country-of-origin approach would risk undermining consumer protection. Consumer groups note that this approach would create incentives for businesses to operate from jurisdictions with lax consumer protections. The result, a "race to the bottom", would harm consumers and ultimately undermine consumer confidence in electronic commerce.[28]

3. **Prescribed Seller Approach**

   A variation of the country-of-origin involves businesses only being subject to the laws or courts as prescribed in the contract. This approach would allow contractual choice of law and choice of forum provisions dictated by the seller to override substantive protections afforded to consumers in their home country or their right to sue in a local court.

While again this approach is favoured by businesses, consumers argue that this approach would undermine consumer confidence in electronic commerce.

4. **Deference Approach**

A further variation of the country of origin approach involves deferring to the laws selected by the business, as long as they provide an adequate overall level of protection and would not take away a consumer's fundamental protections.

However, this approach appears difficult, if not impossible, to implement. It would require reaching agreement on benchmark "deference standards". A court or governing body would then need to analyze the laws of each of the jurisdictions to determine if they met the standards. The task would be extremely burdensome and would require ongoing evaluation.[29]

5. **Targeting Approach**

Another approach is to adopt a compromise rule that incorporates a targeting-based analysis.[30] The targeting approach assumes that if a vendor specifically targets a purchaser in a particular jurisdiction, the courts of that jurisdiction should exercise jurisdiction.

One of the difficulties with this approach is determining or agreeing upon "what constitutes targeting". For example, should efforts to prevent access by a consumer to a site through the use of disclosures or disclaimers and other technological blocking or screening mechanisms shield the online vendor from an assertion of jurisdiction?

The Approach adopted in the European Union

While a number of international initiatives are currently under consideration, the European Union has recently adopted new rules relating to jurisdictional issues in the context of e-commerce.

Brussels Regulation
For legal proceedings commenced after March 1, 2002, the Brussels Regulation will replace the Brussels Convention on Jurisdiction and Recognition of Enforcement of Judgments in Civil and Commercial Matters (1968).

The changes introduced by the Brussels Regulation provide for uniform rules that address which court has jurisdiction to hear disputes regarding contracts concluded over the Internet. The basic jurisdictional rule set out in the Brussels Regulation is that a defendant shall be sued in the state it is domiciled. However, the Regulation provides for special rules for

consumer contracts which provide that in the case of consumer contracts, the relevant test is whether an online vendor "directs activities" in the consumer's home state.

Where an online vendor directs activities in the consumer's home state, the consumer will be entitled to sue the vendor in the consumer's home domicile, unless the consumer chooses to sue the vendor in the vendor's domicile.

The Brussels Regulation has been criticized by business groups. In opposition to the Regulation, business groups have argued that the Regulation will lead to online vendors finding themselves involved in disputes governed by the laws of countries that have more onerous laws and that this will lead to businesses being paralyzed by the legal risk presented by being subject to the laws of all of the member states.

At the time the Regulation was passed, a joint declaration was issued by the European Parliament and Commission which stated that:

> the mere fact that an Internet site is accessible is not sufficient for Article 15 [the provision dealing with consumer contracts] to be applicable, although a factor will be that this Internet solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency with which a web site uses does not constitute a relevant factor.

Competing Policy Objectives

Reforming jurisdictional rules raises difficult questions about balancing the need for certainty while at the same time protecting consumers effectively.

In attempting to establish jurisdictional rules to determine which court should hear a dispute and which laws should apply, it is worthwhile to reflect on the following policy considerations:

- consumer protection online should be no less effective than through traditional means of communication;
- consumers should be able to benefit from the protection normally afforded to them by local consumer protection laws;
- the law should be technology neutral so that it does not discriminate between different forms of technology (recognizing that using tests that reflect the current state of the Internet technology is a risky proposition because of rapid rate at which technology is changing);
- there should be certainty about rules that apply to the participants and their transactions so that they are able to predict their legal situation before engaging in commerce;
- the legal risk of operating online should not be disproportionate to a business' connection to the relevant forum's laws and courts;
- business should be able to choose whether or not to operate under a particular jurisdiction's legal framework; and

- the rules should not be an impediment to the continued growth of electronic commerce.

Proposal

The challenge is to develop a workable framework for jurisdictional issues that protects consumers and is fair and predictable for businesses. Clearly, a balanced approach is needed.

Considering the general policy objectives above and in light of international developments, the following set of jurisdictional rules that incorporate the "targeting approach" to both choice of forum and choice of law is proposed.

The proposed rules were drafted with a view to combining the advantages of the international and Quebec approaches noted above. In particular, the proposed rules draw on the following:

- The Brussels Regulation which provides for a targeting approach for choice of forum. Therefore, where an online vendor directs activities in the consumer's home state, the consumer will be entitled to sue the vendor either in the consumer's home state or the vendor's home state;
- The Hague Conference on Private International Law. The October 1999 Preliminary Draft Convention also provides for a targeting type approach for choice of forum. In particular, it refers to circumstances where an online vendor directs activities in the consumer's home state by soliciting business through means of publicity;
- The Brussels Regulation and the October 1999 Preliminary Draft Convention do not define "directing activities" or "soliciting". The Hague Conference Draft Text, June 2001 is of assistance in this regard because it provides a negative description. Article 7, paragraph 3 states that a vendor's activities will not be regarded as "directed" to a state if the vendor demonstrates that it took reasonable steps to avoid contracting with consumers habitually resident in that state;
- The Brussels Regulation also provides that
  - Where an online vendor directs activities in the consumer's home state, the consumer has the right to bring proceedings against the vendor either in the consumer's home state or in the vendor's home state;
  - The vendor is only entitled to sue the consumer in the consumer's home state;
  - The consumer and vendor can enter into an agreement regarding choice of forum which departs from the jurisdictional rules set out, only if the agreement is entered into after the dispute has arisen or if it allows the consumer to bring proceedings in the courts of jurisdictions other than those provided for in the rules.

- The 1980 EC Convention on the Law Applicable to Contractual Obligations ("Rome I Convention") which deals with applicable law in contractual disputes. The Rome I Convention was set up by the European Union and establishes that a choice of law provision in a consumer contract does not deprive the consumer of the protection of the mandatory rules of the law of the country of his or her habitual residence. To qualify for this protection, however the contract must satisfy any one of the following three conditions

- The consumer contract was solicited by the vendor in the consumer's domicile and the consumer completed all contract formation steps there;
- The vendor received the consumer's order through an agent in the consumer's country;
- The consumer traveled to another country and gave the order in that country, provided that the consumer's journey was arranged by the vendor to induce the consumer to buy.

- As noted earlier, Book Ten of the *Civil Code of Quebec*, article 3117 sets out rules governing conflicts of laws which are similar to rules established in the Rome I Convention.

For a more detailed discussion of the international and national initiatives, please see Appendix I to this paper.

Rules governing Choice of Forum in consumer contracts

This rule would be used to determine when a court may assert jurisdiction to hear a dispute arising in respect of a consumer contract:

1. In circumstances where :

   (a) the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor and the consumer took all the necessary steps for the formation of the consumer contract in the consumer's jurisdiction; or

   (b) the consumer's order was received by the vendor in the consumer's jurisdiction; or

   (c) the consumer was induced by the vendor to travel to a foreign jurisdiction for the purpose of forming the contract and the consumer's travel was assisted by the vendor;

   the consumer has the option to bring proceedings against the vendor either in the courts of consumer's jurisdiction or in the courts of the vendor's jurisdiction

2. For the purposes of subsection 1(a), if a vendor clearly demonstrates that it took reasonable steps to avoid concluding contracts with consumers resident in a particular jurisdiction, it is deemed not to have solicited business in that jurisdiction.

3. A vendor may bring proceedings against the consumer only in the courts of the consumer's jurisdiction.

4. The provisions of section 1 may be varied by agreement only if the agreement:

   (a) is entered into after the dispute has arisen; or

   (b) allows the consumer to bring proceedings in courts other than those provided for in section 1.

Rules governing Choice of Law in consumer contracts

This rule would be used to determine which jurisdiction's laws should apply to determine the rules applicable to a dispute in respect of a consumer contract.

1. The parties to a consumer contract may agree that the law of a particular jurisdiction will apply to the consumer contract.

2. No agreement as to the law applicable to the consumer contract will deprive a consumer of the protection to which he or she is entitled under the law of the consumer's jurisdiction provided that:

   (a) the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor and the consumer took all the necessary steps for the formation of the consumer contract in the consumer's jurisdiction; or
   (b) the consumer's order was received by the vendor in the consumer's jurisdiction; or
   (c) the consumer was induced by the vendor to travel to a foreign jurisdiction for the purpose of forming the contract and the consumer's travel was assisted by the vendor.

   (Note: This provision recognizes that the parties cannot contract out of the essential elements of a consumer contract. Similarly, parts of the process of forming and enforcing a consumer contract may be essential. The appropriateness of contracting out of this process by way of mediation or dispute resolution provisions in consumer contracts should be addressed in the future.)

3. If there is no agreement as to the applicable law in a consumer contract, the law of the consumer's jurisdiction shall apply provided that at least one of the conditions set out in section 2 is met.

4. For the purposes of subsection 2(a), if a vendor clearly demonstrates that it took reasonable steps to avoid concluding contracts with cons umers resident in a particular jurisdiction, it is deemed not to have solicited business in that jurisdiction.

Conclusion

In summary, clear rules of jurisdiction and choice of law are required for the protection of consumers and to assist businesses contracting in both the online and offline environment. Although a number of international initiatives are currently under review, international solutions appear to be far away. In light of this, it is important to consider whether adopting the above rules would provide a sound legal framework for resolving jurisdictional issues in Canada.

The above rules are intended to develop a co-ordinated approach to answer both:

(a) which court has jurisdiction to hear the dispute; and
(b) which province or territory's laws govern the resolution of the dispute.

Interested parties are invited to consider the following questions:

- Will the adoption of the above rules as general principles provide guidance and greater legal certainty for online consumer transactions conducted within Canada?
- Would the application of the rules work in the offline environment?
- Would the rules assist in ensuring that transactions on the Internet are governed by consistent principles – leading to predictable results regardless of the jurisdiction in which a particular buyer or seller resides?

APPENDIX I

Introduction

The following is an overview of some of the national and international initiatives currently underway to address jurisdictional issues with respect to electronic commerce.

United States

American Bar Association Project: Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction

In 1998, the American Bar Association launched a major project on jurisdictional issues relating to the Internet "to explore the issues, uncertainties and conflicts created by the proliferation of electronic commerce" ("ABA Project")[31].

Scope of the Project

The ABA Project is intended to address personal, prescriptive and enforcement jurisdiction issues separately with respect to the following areas: advertising/consumer protection, intellectual property, payment systems/banking, data protection, public law/gaming, sale of goods, sale of services, securities and taxation. The American Bar Association has committed significant resources to this project.[32]

The Draft Report

In July 2000, a draft report containing the preliminary results of the study was released. The report is titled "Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet" ("ABA Report")[33].

The ABA Report notes that "the volume of cross-state contracts has increased and will continue to increase at a more rapid rate by virtue of the proliferation of electronic communications and the use of the Internet in commercial applications. Whether that increase will require a normative rethinking of jurisdictional principles similar to that which occurred in the middle of the 20th century is at the heart of much of the current consideration of effective Internet dispute resolution"[34]

The goals of the ABA report are stated as follows:

> ....to create a global summary of the law of jurisdiction and to explore the issues, uncertainties created by the proliferation of the electronic commerce.[35]

The report notes that "the completion of this task was far more difficult that originally envisioned".[36]

However, the study indicates that the "reduction of legal uncertainty is critical to the development of an efficient and effective system to promote electronic commerce".[37]

By way of overview, the report summarizes criteria that it believes governments, interested organizations, legislatures and courts should consider in establishing rules, standards and policies to govern electronic commerce globally. Included in this summary are the following observations:

Jurisdictional Default Rules

- Every Internet party should be subject to personal and prescriptive jurisdiction somewhere. In reasonable circumstances, more than one state may be able to assert both personal and prescriptive juris diction in electronic commerce transactions, as they have historically in physical transactions.

- Personal or prescriptive jurisdiction should not be asserted based solely on the accessibility in the state of a passive web site that does not target the state.

- Both personal and prescriptive jurisdiction should be assertable over a web site content provider ("sponsor") in a state, assuming there is no enforceable contractual choice of law and forum, if:

    - the sponsor is a habitual resident of the state or has its principal place of business in that state;
    - the sponsor targets that state and the claim arises out of the content of the site; or
    - a dispute arises out of a transaction generated through a web site or service that does not target and specific state, but is interactive and can be fairly considered knowingly to engage in business transactions there.

- Good faith efforts to prevent access by users to a site or service through the use of disclosures, disclaimers, software and other technological blocking or screening mechanisms should insulate the sponsor from assertions of jurisdiction.

    - Purchasers and sellers should be encouraged to identify with adequate prominence and specificity, the state in which they habitually reside;
    - Sponsors should be encouraged to indicate the jurisdictional target(s) of their sites or services, either by: (a) defining the express content of the site or service, or listing destinations targeted or not targeted; and (b) by deciding whether or not to engage in transactions with those who access the site or service.

Contractual Choice of Law and Forum

- Absent fraud or related abuses, forum selection and choice of law provisions should be enforced in business-to-business electronic commerce transactions.

- In business-to-consumer contracts, courts should enforce mandatory, non binding arbitration clauses, where sponsors have opted to use them, and permit the development of a "law merchant" in exchange for:

  - the sponsor's agreement to permit enforcement of any resulting final award or judgment against it in a state where it has sufficient assets to satisfy that award or judgment; and
  - the user's acceptance of an adequately disclosed choice of forum and choice of law clauses.

- Jurisdictional choices should be enforced where the consumer demonstrably bargained with the seller.

- Jurisdictional choices should also be enforced if the choice of the consumer to enter into the contract was based on the use of a programmed, intelligent agent on Bot deployed by or on behalf of the consumer and whose programming included such terms as the nature of the protections sought, the extent to which such protections are enforceable and other factors that could determine whether the user should enter into the contract.[38]

Targeting

The report notes that what constitutes targeting needs to be agreed upon globally. It suggests that generally, targeting should cover technological practices that sponsors use to purposefully avail themselves of the commercial benefits of the targeted states. Maintenance of web site, by itself, should not constitute targeting the world. However, designing a web site whose only, or at least primary, relevance is to the population of a single forum clearly does target that forum.

The critical issues are the intent of the web site sponsor and what constitutes sufficient evidence of intent. The site itself provides the first evidence of that intent. It may contain a list of jurisdictions it intends to target and filters to block participants from other states. It may contain a list of jurisdictions it does not intend to target. But filters may be by-passed, and stated intent may not reveal reality. When transactions are involved, the best evidence of intent is the willingness to deal with persons in the forum state.[39]

Global Online Standards Commission

The study also recommends that a multinational Global Online Standards Commission be empanelled to study the jurisdiction issue and develop uniform principles and global protocol standards working with other international bodies cons idering similar issues.[40]

Contractual Choice of Forum and Law Clauses

In the United States, choice of forum and law clauses are enforced unless they are "unreasonable". The report suggests that to the extent that the Internet is both limiting the ability of a seller to confine its market and consequently, dramatically widening the options available to buyers, the presumption of inequality in business-to-consumer transactions is called into question. More specifically, it suggests that "the policy reasons for refusing to enforce contractual choice of forum and law clauses in that context are correspondingly weakened".[41]

Goal of ABA Project

It is further noted that, ultimately, the goal of the ABA Project is to determine whether there is a workable set of legal standards that can form a basis to answer the question of whose laws apply to Internet commerce and where disputes involving that commerce should be resolved.[42]

Response of United States Federal Trade Commission

Although the Federal Trade Commission has been asked to support the recommendations in the ABA Report, the Commission has indicated that it is "concerned that the proposed solutions run the risk of eroding consumer protection in the global marketplace".[43]

> In particular, the Federal Trade Commission Bureau of Consumer Protection has expressed concern about "changes to the current framework that would: (1) give incentives to businesses to establish themselves, or rely on laws, in jurisdictions with weak consumer protections; (2) deny governments the right to protect their own citizens from fraud, unfairness, and deception; (3) deprive consumers of meaningful access to remedies; or (4) cause consumers to rely on insufficient, burdensome or unfamiliar protections.[44]

In June 1999, the Federal Trade Commission held a public international workshop on "US Perspectives on Consumer Protection in the Global Electronic Marketplace."[45] In its report on the workshop, the Commission notes:

> The legal challenges raised by determining applicable law and jurisdiction have no simple solutions. Various countries and regions have various frameworks for handling these issues. Developing an international framework that protects consumers and is fair and predictable for business is key to supporting the long- term growth of e-commerce. Although a workable framework for applicable law and jurisdiction is only part of the global solution, it warrants careful consideration.[46]

The FTC report specifically "cautions against moving to a country-of-origin approach, notwithstanding the problems posed by current systems which incorporate a country-of-destination approach for consumer protection.[47]

Hague Conference on Private International Law

The Hague Conference on Private International Law is currently working on a draft convention on jurisdiction and enforcement of judgments in civil and commercial matters. The international treaty would be a worldwide convention that would replace the *1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,* which has not been entirely successful. The Convention only addresses the choice of forum, not the law that would apply to the case.[48]

The objective of the project is to increase legal foreseeability and the reliability of judgments at international level for the benefit of all economic operators and private individuals.

Preliminary Draft Convention - October 30, 1999

A preliminary draft Convention was adopted by a Special Commission of the Hague Conference on October 30, 1999[49]. The preliminary draft convention lays down special rules of jurisdiction for consumer contracts. Article 7 of the draft text provides as follows:

> **Article 7 Contracts concluded by consumers**
>
> 1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if
>
> a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
>
> b) the consumer has taken the steps necessary for the conclusion of the contract in that State.
>
> 2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.
>
> 3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court:
>
> a) if such agreement is entered into after the dispute has arisen, or
>
> b) to the extent only that it allows the consumer to bring proceedings in another court.

Commentary

By virtue of this paragraph, the consumer would be permitted to bring a legal action before the courts in which he or she is habitually resident or the consumer could chose to bring an action in the defendant's forum. However, the option given to the consumer of using the forum of his or her habitual residence would not be unlimited. It would only exist where the

vendor had actively sought to reach the consumer in the consumer's home jurisdiction. Paragraph 3 was aimed at restricting the freedom of the parties to choose the court with competence to deal with disputes arising between them.

U.S. Opposition to Draft Text

At the October 1999 Conference it became clear that significant disagreement existed over the draft text and the policy decisions it reflected. In particular, the U.S. Delegation opposed the language in Article 7 on the basis that it would create an absolute rule against choice of forum clauses in consumer contracts. It was indicated that this would be inconsistent with U.S. law, where such clauses may be enforced if they are not unjust and unreasonable and it was expected that there would be vigorous opposition to the Convention in the U.S. if the U.S. Delegation were to accept an outright prohibition on choice of forum clauses. Therefore, the U.S. Delegation stated that the preliminary draft Convention was not a suitable basis for final negotiations without significant additional work. In February 2000, the United States formally suggested that the project be suspended indefinitely.[50]

Expert Meeting in Ottawa

The Hague Conference held an expert meeting in Ottawa on February 28, 2000, to examine the issues raised by electronic commerce in relation to the international jurisdiction of the courts. During this meeting, delegates focused on targeting as a means of distinguishing when consumers should be entitled to sue in their home jurisdiction.[51]

Conference separated into two parts

In May 2000, the Hague Conference decided not to suspend the project, but to postpone the Diplomatic Conference that was to have taken place in October 2000. In addition, the Diplomatic Conference was separated into two parts with the first part in June 2001 and the second in early 2002.[52]

First Part of the Diplomatic Session – June 2001

The First Part of the Diplomatic Session took place in June 2001. The negotiations at that time illustrated "the difficulties inherent in producing a draft that is both widely acceptable and workable in the Internet environment." The delegations were unable to agree a number of key e-commerce issues, including consumer contracts. While they confirmed their dedication to the project in principle, it was decided that the Second Part of the Diplomatic Session could not be held before the end of 2002 and that Commission should meet again early in 2002 to thoroughly examine the nature and state of the conditions for a successful conclusion of the negotiations.[53]

The Resolution passed on June 23, 2001 stipulates that consultations were to be undertaken before the Second Part of the Session to determine the preconditions for the conclusion of the negotiations, relating both to the substance of the Convention and to the method and possible timetable for the future negotiations. Member States were encouraged to find a way in which to approach issues on which a broad consensus had not yet emerged, consider the manner in which negotiations might be conducted, and determine an appropriate schedule for any future negotiations.

Draft Text of Convention – June 2001

As a result of the discussions at the June 2001 Conference, a new text was prepared which contains numerous options and alternatives. The latest text of Article 7 of the draft Convention[54] provides as follows:

[*Article 7 Contracts concluded by consumers*

1. This Article applies to contracts between a natural person acting primarily for personal, family or household purposes, the consumer, and another party acting for the purposes of its trade or profession, [unless the other party demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract primarily for personal, family or household purposes, and would not have entered into the contract if it had known otherwise].

2. Subject to paragraphs [5-7], a consumer may bring [proceedings][an action in contract] in the courts of the State in which the consumer is habitually resident if the claim relates to a contract which arises out of activities, including promotion or negotiation of contracts, which the other party conducted in that State, or directed to that State, [unless [that party establishes that] –

a) the consumer took the steps necessary for the conclusion of the contract in another State;[and

b) the goods or services were supplied to the consumer while the consumer was present in the other State.]

[3. For the purposes of paragraph 2, activity shall not be regarded as being directed to a State if the other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the State.]

4. Subject to paragraphs [5-7], the other party to the contract may bring proceedings against a consumer under this Convention only in the courts of the State in which the consumer is habitually resident.

[Alternative A

5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, the consumer may bring proceedings against the other party in the courts of the State designated in that agreement.

7. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, Article 4 applies to the agreement to the extent that it is binding on both parties under the law of the State in which the consumer is habitually resident at the time the agreement is entered into.

Add at the beginning of Article 25 the words:

'Subject to Article 25 *bis*

Insert [*Article 25 bis*

1. A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under which it will recognise or enforce a judgment under this Chapter, where -

a) the judgment was rendered by the court of origin under Article 7(2) [or Article 8(2)]; and

b) the parties had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.

[2. A declaration under this Article may not deny recognition and enforcement of a judgment given under Article 7(2) [or Article 8(2)] if the Contracting State making the declaration would exercise jurisdiction under the relevant Article in a corresponding case.]

3. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration.]]

[Alternative B

[*Variant*

5. This provision may be departed from by a jurisdiction agreement provided that it conforms with the requirements of Article 4.

6. A Contracting State may declare that–

a) it will only respect a jurisdiction agreement if it is entered into after the dispute has arisen or to the extent that it allows the consumer to bring proceedings in a court other than a court indicated in this Article or in Article 3; and

b) it will not recognise and enforce a judgment where jurisdiction has been taken in accordance with a jurisdiction agreement that does not fulfil the requirements in sub-paragraph *a)*.]

[*Variant 2*

5. Article 4 applies to an agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen; or to the extent that the agreement permits the consumer to bring proceedings in a court other than the consumer's habitual residence.

6. A Contracting State may declare that in the circumstances specified in that declaration –

a) it will respect a jurisdiction agreement entered into before the dispute has arisen;

b) it will recognise and enforce a judgment in proceedings brought by the other party given by a court under a jurisdiction agreement entered into before the dispute has arisen;

c) it will not recognise and enforce a judgment given by a court in which proceedings could not be brought consistently with a jurisdiction agreement entered into before the dispute has arisen.]]

[Alternative C

5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen –

a) the consumer may bring proceedings against the other party under the Convention in the courts of the State designated in that agreement;

b) the consumer may not bring proceedings against the other party under this Convention in any other court, unless the agreement permits the proceedings to be brought in that court;

c) the other party may bring proceedings against the consumer under this Convention only if the agreement permits the proceedings to be brought in the courts of the State in which the consumer is habitually resident.]]

April 2002 Meeting

A special meeting of the Hague Conference's Commission I (General Affairs and Policy of the Conference), was held on April 22-24, 2002 to consider how to proceed on the negotiations regarding the Convention. At the opening of the meeting, Australia and Japan took the position that the Conference should go back to the October 1999 draft of the convention, which had been rejected as unworkable by U.S. officials and business interests.[55]

In the end, the Commission tentatively agreed to set up a new drafting committee to develop an entirely new draft by focusing on "core" provisions for the treaty. The committee is to submit its work to a formal meeting of a special commission in the first half of 2003. The Conference hopes to conclude the treaty with a final diplomatic conference before the end of 2003.[56]

European Union

In Europe, the main rules covering choice of forum and choice of law are the following:

- *The Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* ("Brussels Regulation"), and

- *The Rome Convention on the Law Applicable to Contractual Obligations* (the "Rome I Convention").

Brussels Regulation

In December 2000, the Council of Europe approved the Brussels Regulation to come into effect on March 1, 2002.[57] The Brussels Regulation is based on and replaces the *Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, Sept. 27, 1968. (The EFTA countries, Iceland, Liechtenstein, Norway, Switzerland and Poland apply the rules of the *Lugano Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters*, Sept. 16, 1988, which is similar to the Brussels Convention).

Scope of the Regulation

The Brussels Regulation deals with matters of jurisdiction in civil and commercial disputes within the European Union. The Regulation provides rules for determining the competent court in cases of cross-border disputes, including electronic commerce transactions within the European Union. The Regulation also deals with enforcement of foreign judgments. All EU Member States, except Denmark, are covered by the Brusse ls Regulation.

Special Rules Covering Consumer Contracts

The Brussels Regulation sets out the following special rules with respect to consumer contracts:

Section 4 - Jurisdiction over consumer contracts

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

   (a) it is a contract for the sale of goods on instalment credit terms; or

   (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

   (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party

shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Commentary

Under the new rules, consumers within the European Union are given the right to bring proceedings against vendors either in the courts of the Member State of the consumer's domicile or in the courts of the Member State of the vendor's domicile if:

- the contract is for the sale of goods on instalment credit terms, a loan repayable by instalments or for any other form of credit made to finance the sale of goods; or
- the vendor pursues commercial or professional activities in the Member State of the consumer's domicile, or in any manner directs such activities to that Member State, and the subject contract falls within the scope of such activities.

Under Article 16, proceeding may only be brought against consumers in the courts of the Member State where the consumer is domiciled.

Article 17 of the Regulation prevents the parties to a consumer contract from agreeing to depart from the above provisions before a dispute has arisen.

During the passage of the rules, the consumer provisions gave rise to particular interest and concern amongst business organizations, consumer organizations and other stakeholders.

Business groups argue that the approach adopted in the Brussels Regulation will create legal uncertainty for companies using the Internet. For example, they have expressed concern that small and medium-sized enterprises will be burdened with substantial legal costs since they may have to defend themselves before the courts in all the Member States in which their activities might be accessible.[58]

The European Council and Commission issued a joint statement regarding Article 15, which points out:

> the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which web site uses does not constitute a relevant factor. [59]

The joint statement does not provide detailed guidance on the interpretation of "directing activities to a Member state".

The Brussels Regulation does not contain provisions on the choice of law governing the substance of a dispute. Rather, such provisions are included in the Rome Convention of 1980.

Rome I Convention

The 1980 EC Convention on the Law Applicable to Contractual Obligations ("Rome I Convention") deals with which country's law applies in contractual disputes[60].

The Rome Convention was set up by the European Union. The parties to the Convention are the members of the European Union.

Special Rules Covering Consumer Contracts

The Rome I Convention sets out the following special rules with respect to consumer contracts:

Article 5 - Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

   - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

   - if the other party or his agent received the consumer's order in that country, or

   - if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

   (a) a contract of carriage;

   (b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Commentary

The basic principle of the Rome I Convention is the parties' freedom of choice of law. However, there are special rules concerning the choice-of-law in consumer contracts that do not allow the parties, under certain circumstances, to limit or exclude by contractual agreement, the mandatory rules of the law of the consumer's jurisdiction.

For example, there are rights given to consumers by national legislation, such as rights to cooling of periods or the right to receive goods which are of satisfactory quality. If the contract meets one of the tests in Article 5.2, the court will apply the mandatory law of the consumer's country in deciding the parties' rights and obligations under the contract, regardless of any choice of law clause to the contrary. Article 5 will only be applied if the mandatory rules of the consumer's habitual residence provide the consumer with better protection than the protection afforded under the choice of law clause.

In order to qualify for the protection of Article 5, the contract must satisfy any one of the following three conditions:

- The first condition is that the consumer contract was solicited by the vendor in the consumer's domicile, and the consumer completed all contract formation steps there.
- The second condition is where the vendor received the consumer's order through an agent in the consumer's country.
- The third condition concerns cross-border excursions for the purchase of goods.

Excluded from the operation of the provision are contracts of carriage and contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

Review of the Rome I Convention

Although there has been some discussion within the European Commission to revise the Rome Convention to achieve a level of continuity between the Brussels I Regulation and the Rome Convention with respect to electronic commerce, no such revisions are expected to be made in the near future.

[1] On May 25, 2001, federal, provincial and territorial ministers responsible for consumer affairs approved a new approach to harmonized consumer protection legislation in electronic commerce which will ensure consumers benefit from equal protection across the country. A common template endorsed by the Ministers will cover contract formation, cancellation rights, credit card charge-backs and information provision. The template is available on line at: http://strategis.ic.gc.ca/SSG/ca01642e.html.

[2] Geist, Michael. "Is There A There There? Toward Greater Certainty for Internet Jurisdiction." 2001. Uniform Law Conference of Canada. Online. Available at http://www.ulcc.ca/en/cls/index.cfm?sec=4; and Tasse, Roger, O.C., Q.C. "Online Consumer Protection: A Study on Regulatory Jurisdiction in Canada." Maxime Faille, Gowling Lafleur Henderson LLP, July 2001. Uniform Law Conference of Canada. Online. Available at http://www.ulcc.ca/en/cls/index.cfm?sec=4.

[3] Tasse, Roger, O.C., Q.C. "Online Consumer Protection: A Study on Regulatory Jurisdiction in Canada." Maxime Faille, Gowling Lafleur Henderson LLP, July 2001. Uniform Law Conference of Canada. Online. Available at http://www.ulcc.ca/en/cls/index.cfm?sec=4.

[4] American Bar Association. "London Meeting Draft: Achieving Legal and business Order in Cyberspace - A report on Global Jurisdiction Issues Created by the Internet." American Bar Association Global cyberspace Jurisdiction Project. [n.d.] p. 1. American Bar Association Network. Online. Available at http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf; and Tasse, p 1.

[5] *Uniform Court Jurisdiction and Proceedings Transfer Act,* Uniform Conference of Canada. Online Available at http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1c4

[6] The *Uniform Court Jurisdiction and Proceedings Transfer Act* proposes to replace these different jurisdictional rules with a uniform set of standards for determining jurisdiction. The Uniform Act would "give the rules of jurisdiction an express statutory form instead of leaving them implicit in each province's rules for service of process. In the vast majority of cases this Act would give the same result as existing law, but the principles are expressed in different terms." Introductory comments, paragraph 0.2.

[7] *Uniform Court Jurisdiction and Proceedings Transfer Act,* see paragraph 3.2, which suggests that the existing rule that a court has jurisdiction over any person that is served with process in the forum province or territory and which permits a court to take jurisdiction on the basis of the defendant's presence alone, is of doubtful constitutional validity

[8] In *Hunt v. T & N* [1993] 4 S.C.R. 289, [1993] S.C.J. No. 125, the Supreme Court of Canada : "...courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place." and in *Morguard v. De Savoye* [1990] S.C.J. No. 135 (1990), the Supreme Court of Canada held "properly restrained jurisdiction was a precondition for the recognition and enforcement of a default judgment throughout Canada".

[9] Sookman, Barry B. Sookman: Computer, Internet, and Electronic Commerce Law, Vol.3. Toronto: Carswell. 2002. P.11-33.

[10] *Hunt v. T & N* [1993] 4 S.C.R. 289.

[11] *Rudder v. Microsoft Corp.* [1999] O.J. No. 3778.

[12] *Rudder v. Microsoft Corp.* [1999] O.J. No. 3778; and Geist, pp 45-50.

[13] Id.para,18, 19 and 20; and Geist pp. 45-50.

[14] Ogilvy Renault Internet Group. "Jurisdiction and the Internet: Are Traditional Rules Enough?". July 1998. Uniform Law Conference of Canada . Online. 12 December 2001. Available at http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm.

[15] *See Uniform Court Jurisdiction and Proceedings Transfer Act, subsection 11(2);*

[16] *Craig Broadcast Systems Inc. v. Frank N. Magid Associates Inc.* (1998), 123 Man. R. (2d) 252.

[17] Geist.

[18] For example, Stravitz, Howard B. "Personal Jurisdiction in Cyberspace: Something More is required on the Electronic Stream of Commerce." 49 S.C.L. Rev 925, 939 (1998); and Tassee, page 10.

[19] Chissick, Michael and Alistair Kelman. Electronic Commerce: Law and Practice. 3rd Ed. London: Sweet & Maxwell. 2002. P. 122.

[20] For a detailed review of consumer protection legislation in Canada see Tasse, Roger and Kathleen Lemieux. "Consumer Protection Rights in Canada in the Context of Electronic Commerce. March 1998. Office of Consumer Affairs. Online. Available at http://strategis.ic.gc.ca/SGG/ca01003le.html.

[21] Castel, J.G., Canadian Conflict of Laws. 4th Ed. Toronto: Butterworths. 1997. P.596-98.

[22] Sookman page 10-35. *Bank of Montreal v. Snoxell* (1982), 143 E.L.R. (3d) 349.

[23] For example, the Hague Conference on Private International Law, The American Bar Association, the Internet Law and Policy Forum, the International Chamber of Commerce, the Global Business Dialogue, the United Nations Commission on International Trade Laws, the World Intellectual Property Organization and others are studying Internet jurisdictional issues.

[24] Kessedjian, Catherine. "Summary of discussions ." Ottawa meeting on Electronic Commerce and International Jurisdiction, February 28 – March 1, 2000. Paper prepared with the co-operation of the private international law team of the Ministry of Justice of Canada. Preliminary Document No 12 of August 12 of August 2000, for the attention of the Nineteenth Session, p. 11. Online. Available at http://www.cptech.org/ecom/jurisdiction/hague.html.

[25] See, for example, Consumers International http://www.consumersinternational.org

[26] See, for example, International Chamber of Commerce. "Jurisdiction and Applicable Law in Electronic Commerce. June 6, 2001. International Chamber of Commerce. Online. Available at http://www.iccwbo.org/.

[27] United States. Federal Trade Commission. Bureau of Consumer Protection. "Consumer Protection in the Global Electronic Marketplace: Looking Ahead." September 2000.

[28] Consumers International.

[29] Federal Trade Commission.

[30] Geist.

[31] The American Bar Association Jurisdiction in Cyberspace Project empanelled in 1998 under the title, "Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction" ("ABA Jurisdiction in Cyberspace Project"), available online at http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html

[32] See Terms of Reference for *ABA Jurisdiction Cyberspace Project, available at* http://www.abanet.org/buslaw/cyber/initiatives/terms.html

[33] *Achieving Legal and Business Order in Cyberspace: A report on Global Jurisdiction Issues Created by the Internet,* American Bar Association, Jurisdiction in Cyberspace Project, ("ABA Jurisdiction Cyberspace Report"), available online at http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf.

[34] *ABA Jurisdiction Cyberspace Report,* page 7.

[35] *ABA Jurisdiction Cyberspace Report,* page 19.

[36] *ABA Jurisdiction Cyberspace Report,* page 19.

[37] *ABA Jurisdiction Cyberspace Report,* page 19.

[38] *ABA Jurisdiction Cyberspace Report,* pages 20-26.

[39] *ABA Jurisdiction Cyberspace Report,* page 30.

[40] *ABA Jurisdiction Cyberspace Report,* page 24.

[41] *ABA Jurisdiction Cyberspace Report,* pages 34-37.

[42] *ABA Jurisdiction Cyberspace Report,* page 9.

[43] United States Federal Trade Commission, letter to the Section of Business Law, American Bar Association, dated November 20, 1999, a copy of letter is available online at http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html

[44] United States Federal Trade Commission, letter to the Section of Business Law, American Bar Association, dated December 1, 1999, a copy of letter is available online at http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html

[45] See *"Consumer Protection in the Global Electronic Marketplace"* Report, Federal Trade Commission, (*"FTC Consumer Protection Report"*) available at http://www.ftc.gov/bcp/icpw/lookingahead/global.htm

[46] *FTC Consumer Protection Report,* page iii.

[47] *FTC Consumer Protection Report*, page 4.

[48] For information on the *Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,* Hague Conference on Private International Law, refer to http://www.hcch.net/e/workprog/jdgm.html

[49] *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civl and Commercial Matters,* Hague Conference on Private International Law; Note: the preliminary draft Convention, as provisionally adopted by the Special Commission on 18 June 1999, was revised at a meeting held at The Hague from 25-30 October 1999. http://www.hcch.net/e/conventions/draft36e.html

[50] See 22 February 2000, Jeffrey D Kovar, US Department of State Assistant Legal Adviser for Private International Law, letter to J.H.A. Van Loon, Secretary General, Hague Conference on Private International Law, available at http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf

[51] *"Electronic Commerce and International Jurisdiction"*, Ottawa, 28 February-1 March 2000, Summary of discussions prepared by Catherine Kessedjian with the co-operation of the private international law team of the Ministry of Justice of Canada, available at http://www.hcch.net/e/workprog/jdgm.html

[52] See Paper "*Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference*, submitted by the Permanent Bureau, available at http://www.hcch.net/e/workprog/jdgm.html

[53] *Ibid*

[54] See Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, available at http://www.hcch.net/e/workprog/jdgm.html

[55] See the Conclusions of Commission I (General Affairs and Policy of the Conference) of the XIXth Diplomatic Session – April 2002, available at http://www.hcch.net/e/workprog/genaff.html and http://www.cptech.org/ecom

[56] *Ibid*

[57] Regulation (EC) No 44/2001 (Brussels Regulation) available at http://www.europe.eu.int.htm

[58] For example see articles such as "*Self-Contradiction*" by Mark Powell & Angenita Pex *and* published in *The Daily Deal*, available online at http://www.whitecase.com/article_eu_r.html; Also see *Business Angles* available online at http://www.cobbetts.co.uk/angb2.htm See also *The Industry Standard* available online at http://www.thestandard.com/article/display/0,1151,20366,00html

[59] See *Joint Statement on Articles 15 and 68* issued by the European Council and European Commission, available at http://europa.eu.int/comm/justice_home/unit/civil_en.htm

[60] *The Rome Convention on the Law Applicable to Contractual Obligations*, June 19, 1980, 80/EEC, 1980 O.J. (L 266) 2.